Supreme Court, U.S.
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In The

Supreme Court of the United States

SAMUEL LEWIS, former Director of the Arizona Department of Corrections, in his official and individual capacities; et al.,

Petitioners,

v.

DENNIS JOHNSON, et al.,

Respondents.

TERRY STEWART, Director of the Arizona Department of Corrections, in his official and individual capacities; et al.,

Petitioners,

v.

LEROY BACA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Whitley v. Albers*, 475 U.S. 312 (1986), and the deference it affords to decisions by prison officials, applies not only to Eighth Amendment claims challenging actions by prison officials to end prison riots, but also to claims challenging conditions of confinement caused by extraordinary security measures in a riot's immediate aftermath, when prison officials believe such measures are necessary to identify and segregate participants in order to fully restore and maintain order.

PARTIES TO THE PROCEEDINGS BELOW

Lewis v. Johnson (hereinafter "the *Johnson* Lawsuit") – Petitioners are the following officials of the Arizona Department of Corrections ("ADOC"): Samuel Lewis, former ADOC Director; Terry Stewart, current ADOC Director; Deputy Warden Glenn Davis, Arizona State Prison Complex ("ASPC") – Safford; Deputy Warden John Foote, ASPC – Safford; Captain John Abbl; Correctional Service Officer ("CSO") Nations; CSO Macias; CSO Flores; Sergeant Hull; Lieutenant Blackie Hassenzeller; Joe Hawkins; Matthew Proto; Mark Wiley; Dennis Killa; James Bahn; Dwayne Morman; Dennis Grogg; Robert Stalder; and J. C. Keeney.

Respondents are the following eight present or former ADOC inmates who sued individually and on behalf of all others similarly situated: Dennis Johnson, Lawrence E. Cottle, Elias Gutierrez, Leonard Todek, John Pilafas, Robb Steir, Rodney Warner, and Gary Elmore.

Stewart v. Baca (hereinafter "the *Baca* Lawsuit") – Petitioners are the following ADOC officials: Terry Stewart, ADOC Director; former Warden Bill Gotcher, ASPC – Safford; Deputy Warden Frank Terry, ASPC – Safford, Tonto Unit; CSO Ortiz; Captain John Abbl; CSO Thompson; Sergeant Amarillas; Matthew Proto; Dennis Grogg; CSO Darren McWhorter; Armando Amarillas; and Dwayne Morman.

PARTIES TO THE PROCEEDINGS BELOW – Continued

Respondents are the following six present or former ADOC inmates who sued individually and on behalf of all others similarly situated: Leroy Patrick Baca, Eric Baker, Victor Lawrence Farber, Jr., Troy Hamilton, Paul Large, and Larry G. Harper.

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The opinion of the court of appeals is reported at 217 F.3d 726. Appendix (App.) at 1. The judgments of the United States District Court for the District of Arizona granting summary judgment in favor of Petitioners and against Respondents in *Johnson v. Lewis*, App. at 23, and *Baca v. Stewart*, App. at 34, are not reported.

STATEMENT OF JURISDICTION

On June 29, 2000, the court of appeals entered the judgment from which review is sought. App. at 1. On October 2, 2000, the court of appeals denied rehearing. App. at 46. On December 26, 2000, Petitioners' time to file a petition for a writ of certiorari was extended to January 30, 2001. App. at 50. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This matter involves the following constitutional and statutory provisions:

The Eighth Amendment to the United States Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

The consolidated appeal below arose from two separate class action lawsuits challenging the actions of Petitioners ("ADOC Prison Officials") during and immediately after two riots that occurred at two separate units of the Arizona State Prison Complex in Safford in 1995. The factual background of each riot is discussed below.

A. Material Facts

1. The *Johnson* Lawsuit. On the evening of August 14, 1995, inmates dissatisfied with conditions at the 638 bed minimum security Graham Unit of the Arizona State Prison Complex in Safford began a riot. They set fire to tents where 100 of the inmates lived and to several modular structures in the unit, looted the unit's store, and destroyed windows, toilets, and other facilities. App. at 3-4, 23. The damages totaled in excess of one million dollars. App. at 19.

The prison's Tactical Support Unit responded to the riot by first requesting over the public address system

that all non-participating inmates assemble at a designated area; only 21 inmates reported. App. at 4, 24. The Tactical Support Unit then entered the burning unit at 8:30 p.m., exploding diversionary devices in the buildings before entering. App. at 24. The Tactical Support Unit officers met little resistance from the prisoners in the buildings, but encountered prisoners throwing rocks and soda cans in the open yard. *Id.* When the inmates failed to follow orders to stop throwing things, the Tactical Support Unit officers were forced to fire tear gas, knee knockers, and stinger balls at the rioters. *Id.* By 11:15 p.m., the Tactical Support Unit had evacuated all of the buildings, accounted for each inmate, and gathered all of the inmates handcuffed, shackled, and lying face down, on an open grassy area of the yard. App. at 4, 24.

Prison officials continued to hold the inmates in handcuffs, though not shackled, for the next four days in the prison yard while they investigated the disturbance. *Id.* Specifically, the investigation included an exhaustive search of the entire unit, including all living spaces and personal lockers, for weapons and other contraband. App. at 5. Additionally, eleven investigators "worked around the clock to interview each inmate individually." *Id.* The investigation was necessary to identify and segregate those inmates who participated in the riot while, at the same time, holding all the inmates in the safest and most secure area of what remained of the prison unit. App. at 4. As the court of appeals' opinion recognizes, prison officials had limited options under these difficult circumstances:

> Placing inmates back inside the eight dormitories would have fragmented staff and allowed

> inmates access to objects, possibly including shanks, that could be used to cause injury. No single building was large enough to hold all of the inmates except the Multi-Purpose Building, which housed a basketball court and had only one entrance. Although this building would have provided shelter, prison officials considered it too dangerous to use under the circumstances because housing the entire inmate population in a space of that size would have created crowded conditions and thwarted their need to maintain complete physical control over the prisoners in the wake of the riot.

Id.

During the four days that the inmates were detained outside, they were exposed to afternoon high temperatures of up to 94 degrees, nighttime low temperatures of 70 degrees, and one night of rain. App. at 5. Additionally, during the hours immediately after the riot, ADOC Prison Officials did not allow inmates to move from a prone position for any reason, causing some of the inmates to urinate and defecate into their clothing. *Id.* Although prison staff brought two portable toilets onto the yard early on the morning after the riot, inmates alleged they were inadequate. *Id.* Some time later that same day, the situation improved when some of the prison unit's indoor toilet facilities that were damaged by inmates during the riot were repaired and made available to them. App. at 5-6. Inmates also complained that they were served spoiled sack lunches and, until the second day after the riot, had no drinking water, and thereafter only restricted access to drinking water. App. at 6.

At the conclusion of the investigation on the fourth day after the riot, ADOC Prison Officials returned the inmates to their living quarters, and reestablished "normal prison conditions." *Id.*

2. The *Baca* Lawsuit. On December 28, 1995, at approximately 5:50 p.m., widespread racially motivated fighting erupted in the 369 bed Tonto Unit at the Arizona State Prison Complex in Safford. App. at 6, 34. The inmates involved in the rioting were fighting, throwing rocks, and destroying property. *Id.*

Again, the prison's Tactical Support Unit responded to the riot, entering the unit at approximately 6:48 p.m. and ordering the inmates to lie on the ground. App. at 34. At 8:00 p.m., the Tactical Support Unit began the process of clearing all buildings in the unit and escorting inmates to an outdoor ballfield where they cuffed the inmates with knee and wrist restraints and ordered them to lie on the ground. App. at 6, 34. By 12:10 a.m., ADOC Prison Officials had accounted for and secured all prisoners on the ballfield. *Id.*

As before, ADOC Prison Officials kept the inmates outdoors while an investigation ensued, including a search of the buildings and an attempt to identify and segregate those inmates who had participated in the riot. App. at 6. This time, the investigation was completed after 17 hours and officials began returning the inmates to their dormitories at approximately 1:00 p.m. the day after the riot. App. at 6-7.

During these winter hours, the overnight temperature fell to 22 degrees. App. at 7. If an inmate needed to urinate, prison officials allowed him to crawl a short

distance from where he lay to relieve himself on the ground, sometimes causing urine to run onto other nearby inmates. *Id.* At approximately 5:00 a.m., prison officials allowed the inmates to rise and stretch, but when some inmates refused orders to return to the ground, prison officials had to force compliance with tear gas, stinger balls, and knee knockers. App. at 7, 35. After the second disturbance had ended, prison officials assigned some inmates to go into the dormitories to get blankets for the rest. App. at 7.

B. Proceedings Below

On June 16, 1996, inmates filed two separate class action complaints in the United States District Court for the District of Arizona under 42 U.S.C. § 1983 on behalf of the Graham and Tonto Unit inmates who were present during the riots. Plaintiffs in each case asked the court to declare that the actions of the ADOC Prison Officials violated their rights under the Eighth Amendment to the United States Constitution. In addition, Plaintiffs sought an injunction against the future use of the alleged cruel and unusual actions ascribed to the Defendants, as well as compensatory and punitive damages. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331.

The district court granted summary judgment in favor of the ADOC Prison Officials in each case. App. at 23, 34. In separate but similar rulings, the district court applied the heightened standard of wantonness in *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986), which turns on "whether force was applied in a good faith effort to

maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm," to test the actions of the ADOC Prison Officials in quelling the riots. App. at 27-28, 38-40. The district court stated that it would apply a *Whitley*-type standard to the post-riot actions of the ADOC Prison Officials, because during those periods there were "concerns of control and safety that were more important than the typical concerns of administering the prison." App. at 41. Ultimately, however, because the district court ruled that the post-riot claims were not objectively of sufficient seriousness to constitute an Eighth Amendment violation, it did not reach the question of the ADOC Prison Officials' subjective intent. App. at 32-33, 44. Plaintiffs appealed to the Ninth Circuit pursuant to 28 U.S.C. § 1291.

A divided panel of the Ninth Circuit Court of Appeals reversed the district court's decision. First, the majority found that the types of harm alleged created fact questions precluding summary judgment on the issue of whether they were objectively serious enough to satisfy the first prong of the Eighth Amendment test. App. at 11-12. ADOC Prison Officials do not address this issue in this Petition. Then, because the district court had indicated its view that a variation of *Whitley* applied to the second, subjective prong of the Eighth Amendment test, the court of appeals addressed this issue. App. at 14. The court agreed with the district court that the *Whitley* standard applied to the ADOC Prison Officials' immediate response to quell the prison riots. App. at 14-15. Nevertheless, while acknowledging that prison officials had limited options during the post-riot investigation periods, App. at 4, the majority held that the ADOC Prison

Officials were not entitled to application of the heightened *Whitley* standard during these post-riot periods:

> In our view, the exigent circumstances the prison officials faced during the riots persisted until the officials were able successfully to remove the prisoners from the buildings and secure them in the prison yard. . . . When the inmates were in the yard, however, they were handcuffed, prone, and under armed guard. In these circumstances, the inmates presented no further danger to prison staff, the public, or each other, and prison officials were no longer required to make split-second, life-and-death decisions.

App. at 14-15. The court instead applied the "deliberate indifference" standard applicable to normal prison "conditions of confinement" cases. App. at 15.

Judge Sneed dissented, reasoning that the majority ignored the constraints that the ADOC Prison Officials faced during the post-riot sorting-out periods and that it incorrectly presumed that conditions had returned to normal the moment the officials were able to secure the inmates on the prison yards. App. at 22. Because in the aftermath of the two riots, the ADOC Prison Officials were confronted with constraints materially different than those generally faced in prisons, Judge Sneed would have applied the *Whitley* standard to the inmates' post-riot detention treatment. App. at 17-22.

Defendants petitioned the court of appeals for an *en banc* rehearing. Senior Judge Sneed recommended granting the Petition and an active judge requested a vote on whether to rehear the matter *en banc*. App. at 48. The

Petition was denied because it failed to receive a majority of the votes of the active judges. *Id.*

REASONS TO GRANT THE PETITION

The court of appeals erroneously determined that the *Whitley* standard did not apply to the ADOC Prison Officials' actions in the immediate aftermaths of the riots even though the officials took those actions to restore security to the prison and to maintain discipline until instigators and participants could be identified and segregated. This Court should grant the Petition to clarify what was implicit both in *Whitley* and *Hudson v. McMillian*, 503 U.S. 1 (1992) – that is, that the *Whitley* standard applies not only to prison officials' use of force to quell a riot, but also to prison officials' extraordinary actions to restore and maintain discipline in the aftermath of a serious prison disturbance. The Court's clarification is critical to provide prison officials, who must maintain security to protect their own lives and the lives of other staff and inmates in extremely hostile and volatile environments, with the leeway necessary to make difficult and quick decisions when they must act without the benefit of hindsight.

1. The Court of Appeals' Decision Conflicts with Prior Decisions of this Court on an Important Federal Question.

The Ninth Circuit Court of Appeals directed the district court to apply deliberate indifference as the standard

to judge the decisions of the ADOC Prison Officials during the difficult and potentially explosive post-riot situations with which they were confronted. This is contrary to this Court's clear guidance in *Whitley* and *Hudson*. In a line of cases beginning with *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court has established and clarified the proper standards for alleged violations of the Eighth Amendment by prison officials. The test involves both objective and subjective components. Under the objective component, the injury actually inflicted must be sufficiently serious to warrant Eighth Amendment protection. *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 347-49 (1981). The subjective component of the Eighth Amendment test requires that the plaintiff show that the defendant acted with "wantonness." *Wilson*, 501 U.S. at 298-99. The standard necessary to establish wantonness varies with the context of the alleged constitutional violation. *Whitley*, 475 U.S. at 320.

In *Estelle*, this Court held that prison officials who fail to attend to serious medical needs may be liable under the Eighth Amendment if they exhibit "deliberate indifference" to the condition. 429 U.S. at 104. This standard is appropriate because providing inmates with medical care ordinarily does not conflict with competing administrative concerns. *Hudson*, 503 U.S. at 5-6 (citing *Whitley*, 475 U.S. at 320). This deliberate indifference test is generally used to test Eighth Amendment claims alleging unconstitutional conditions of confinement. *See Wilson*, 501 U.S. at 299, 302-03; *Helling v. McKinney*, 509 U.S. 25, 29-30 (1993).

In *Whitley*, the Court established a different standard for the subjective wantonness component of the Eighth

Amendment test when prison officials are required to apply force in the face of an inmate uprising. *Whitley*, 475 U.S. at 320-21. The test is stringent, and asks "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (internal quotations and citations omitted).

In making the determination a court should consider "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted." *Id.* at 321 (quoting *Johnson*, 481 F.2d at 1033) (internal quotations omitted). "[E]qually relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." *Id.* From these considerations, "inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evidenced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Id.*

The foundation of the *Whitley* standard is this Court's admonition to all federal courts that the utmost deference be given to prison officials when "the ever present potential for violent confrontation and conflagration . . . ripens into actual unrest and conflict. . . . " *Id.* at 321 (internal citations omitted). In such situations, " 'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators' " and "carries special weight." *Id.* (quoting *Rhodes*, 452 U.S. at 349 n. 14.) A

heightened standard is appropriate because prison officials "confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force." *Hudson*, 503 U.S. at 6.

This Court further explained in *Whitley* that "deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. . . . [I]t requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." 475 U.S. at 322.

Later, in *Hudson*, this Court held that the heightened *Whitley* standard applies to all allegations of excessive use of force by prison officials, even those outside the riot situation presented in *Whitley*. 503 U.S. at 7. As the Court explained:

> Many of the concerns underlying our holding in *Whitley* arise whenever guards use force to keep order. Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that " '[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' "

> *[Whitley,]* 475 U.S., at 321-22, 106 S.Ct., at 1085 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979)).

Id. at 6.

In this case, the court of appeals recognized that the ADOC Prison Officials were attempting to restore order and maintain security in extremely difficult circumstances, but did not apply the *Whitley* standard. Under the court of appeals' view, prison officials are entitled to only normal levels of deference after riotous inmates are handcuffed, prone, and under armed guard. App. at 15. Deliberate indifference, however, applies to normal prison "conditions-of-confinement" cases, not to the treatment of inmates who are strictly confined and restrained immediately following a riot.

The court of appeals' decision dangerously undermines a cornerstone principle of Eighth Amendment jurisprudence – that prison officials receive the utmost deference in dealing with heightened security needs. Rather than analyzing "the extent of the threat to the safety of staff and inmates, *as reasonably perceived by the responsible officials on the basis of the facts known to them*," *Whitley*, 475 U.S. at 321 (emphasis added), the Court substituted its judgment for that of the ADOC Prison Officials by deciding that no further danger existed that justified application of the *Whitley* standard. App. at 14-15.

The *Whitley* standard should apply to test the actions of the ADOC Prison Officials in the aftermaths of the riots when they reasonably believed it necessary to hold the inmates outside and bound in order to fully restore

order and prevent further rioting while investigators worked around the clock to identify and segregate the instigators of the riots. *See Hudson*, 503 U.S. at 6-7 (the *Whitley* standard applies whenever a prison official is accused of using excessive force, not only during riotous situations, but also during "lesser disruption[s]"). It is undisputed here that normal prison conditions had been seriously disrupted by the riots, a disruption that persisted for as long as it took ADOC Prison Officials to identify and segregate participants before the other inmates could safely return to their living quarters. The actions complained of involved the "forced" restraint and detention of the inmates in secure outdoor areas during post-riot investigations. Because normal prison life was severely disrupted, *Hudson* requires that the *Whitley* standard apply.

Furthermore, the court of appeals erroneously determined that *Whitley* did not apply after the riots ended because *Whitley* applies only to force used to regain order against emergent active hostilities, where "split-second, life and death decisions" are necessary. App. at 15. This is belied by the *Whitley* test itself, which refers not only to the restoration of discipline, but to its maintenance. 475 U.S. at 320-21. It is also contrary to the Court's statement that the type of deference applicable to riot situations applies equally to the "prophylactic or preventive measures" intended to reduce the possibility that a riot or other breaches of prison discipline might reoccur. *Id.* at 322.

Finally, the court of appeals' decision fails to recognize the need to defer to the expertise of prison officials to deal with the circumstances that existed in these cases.

Therefore, in a case where it acknowledged as an uncontroverted fact that prison officials had limited options in the aftermaths of the uprisings, the court should have recognized that it is the on-scene prison officials, and not the courts, who have special expertise in prison matters. *See Turner v. Safley,* 482 U.S. 78, 84 (1987) ("courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform") (quoting *Procunier v. Martinez,* 416 U.S. 396, 405 (1974), *overruled on other grounds, Thornburgh v. Abbott,* 490 U.S. 401 (1989)); *Sims v. Mashburn,* 25 F.3d 980, 986 (11th Cir. 1994) ("The policy itself reflects a well-developed and planned procedure in a field where prison officials, not judges, are experts"); *Williams v. Burton,* 943 F.2d 1572, 1576 (11th Cir. 1991) (" '[I]t is clear that federal courts must defer in many matters to the expert judgment of these administrators, particularly in matters of internal security and order' ") (quoting *Stewart v. Rhodes,* 473 F.Supp. 1185, 1187 (S.D. Ohio 1979), *aff'd,* 785 F.2d 310 (6th Cir. 1986)); *Campbell v. Grammer,* 889 F.2d 797, 801 (8th Cir. 1989) ("Courts should be especially reluctant to interpose their hindsight when the challenged conduct occurred during a prison disturbance"); *Duran v. Elrod,* 760 F.2d 756, 759 (7th Cir. 1985) (because federal judges know little about the management of prisons "it is unseemly for federal courts to tell a State . . . how to run its prison system").

Certiorari should be granted to correct the court of appeals' misapplication of this Court's prior rulings.

2. The Ninth Circuit's Decision Conflicts with the Ninth Circuit's Own Precedent, as well as Decisions of Other Circuit Courts of Appeals.

In addition to straying from this Court's governing principles, the court of appeals' decision conflicts with decisions of other circuit courts of appeals holding that the *Whitley* standard applies to heightened security measures taken by prison officials in response to prisoner disruptions, other than ongoing riots. Indeed, the Ninth Circuit's opinion here stands in sharpest conflict with its own earlier opinion in *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993), where another panel of the same court recognized the need to apply the highest level of deference not only to actions taken by prison officials to control a dangerous in-progress prison disturbance, but also to ensure that hostilities did not re-erupt after the initial containment.

In *LeMaire*, Oregon prison officials forced highly restrictive conditions upon an extremely dangerous and disruptive inmate even when he was not misbehaving. Those forced conditions included feeding the inmate Nutraloaf, restraining him in the shower and his cell, removing his clothing, and denying his outdoor exercise, etc. In testing these limitations against the Eighth Amendment, the Ninth Circuit quoted this Court's language from *Whitley* that official deference extends to " *'prophylactic or preventive measures intended to reduce . . . breaches of prison discipline'* ". *LeMaire*, 12 F.3d at 1453 (quoting *Whitley*, 475 U.S. at 322) (emphasis in original).

The court then determined that the *Whitley* standard applied because (1) "the kind of conduct against which

LeMaire lodge[d] his Eighth Amendment objections" was "conduct designed by prison administrators to maintain control over rebellious inmates;" (2) the security constraints confronting the defendant prison officials were considerable; and (3) LeMaire's complaints were "not so much conditions of confinement or indifference to his medical needs which do not clash with important governmental responsibilities; instead, his complaint [was] leveled at measured practices and sanctions either used in exigent circumstances or imposed after considerable due process and designed to alter LeMaire's manifestly murderous, dangerous, uncivilized, and unsanitary conduct." *Id.* at 1452-53. Significantly, the instant cases involved only a few officers facing hundreds of disruptive inmates, and not a single inmate as in *LeMaire*.

Like *LeMaire*, other circuits have used the *Whitley* standard to judge prison officials' actions to maintain security and have not limited its application to the "split-second, life and death decisions" that the court of appeals found necessary to justify its application in this case. In *Lunsford v. Bennett*, 17 F.3d 1574 (7th Cir. 1994), prison officials were able to quickly quell an inmate flooding disturbance. Rather than placing the inmates in any of several habitable open detention units, the officials shackled the inmates to their cell doors standing ankle-deep in the water as it was being cleaned up. As here, the plaintiff inmates challenged the conditions of their confinement and claimed that they were denied basic hygiene and served poorly-prepared food during their time of forced restraint. In rejecting these claims, the court held:

> Measuring prison officials' conduct under [the *Whitley*] standard applies in situations where

> the prisoners have rioted, or when corrections officers are merely attempting to maintain order. . . .
>
> . . . Once the prisoners flooded the cell block, the guards had to secure the prisoners so that the trustees could mop up the water and prevent physical damage to the prison facility. This required that the prisoners be removed from the cells and restrained appropriately. The guards opened the cells and shackled each prisoner to their cell. Being restrained in this manner for three hours, although uncomfortable, does not seem unreasonable given the circumstances.

17 F.3d at 1581-82 (footnote omitted).

The Eleventh Circuit dealt with a similar situation in *Sims v. Mashburn*, 25 F.3d 980 (11th Cir. 1994). There, after an inmate became disruptive, prison officials "stripped down" his cell by removing his mattress, personal property, blankets and all of his clothes except for his undershorts. His cell remained in this condition into the next day, and he slept on the concrete floor. The court applied the *Whitley* standard to the prison officials' conduct, *id.* at 984, and reversed the district court's finding in favor of the inmate, reasoning as follows:

> The question in this case boils down to a subjective judgment relative to when Sims had demonstrated such a period of stable behavior and a subjective judgment relative to the intervals at which that question should be reevaluated.
>
> Implicit in the actions of the officers in maintaining the strip cell status is the judgment that Sims did not sufficiently demonstrate a period of stable behavior until sometime around 2:00

> P.M. the following day. Giving these officials the deference they are due requires that we accept that judgment unless there is evidence justifying its rejection. There is no such evidence in this case. Similarly, a judgment that Sims should have been reevaluated sooner finds no evidentiary support in this record. A finding that something less than this 29 hour or so "cooling off" period was sufficient fails to give the judgment of these officials the deference they are due.

25 F.3d at 985. *See also Campbell v. Sikes*, 169 F.3d 1353, 1375-76 (11th Cir. 1999) (using the *Whitley* standard to test the prolonged restraint of a disruptive inmate because "the potential for a disturbance in the segregation unit justified the continued use of the restraints and gag until the officers were reasonably assured that the situation had abated"); *Williams v. Burton*, 943 F.2d 1572, 1575-76 (11th Cir. 1991) (the court applied the *Whitley* standard to the use of four-point restraints to a disruptive inmate noting that "[o]nce restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances," but deferred to prison officials on this issue because the deference they were due extended to their "prophylactic or preventive measures" under *Whitley*); *Stengel v. Ellis*, 916 F.2d 423, 426-27 (8th Cir. 1990) (court applied *Whitley* and deferred to jail officials who restrained an inmate for refusing to "show skin" while sleeping because it was "not prepared to second-guess the jailers' judgment given the 'broad administrative and discretionary authority' the federal courts accord prison authorities") (quoting *Hewitt v. Helms*, 459 U.S. 460, 467 (1983)); *Campbell v. Grammer*, 889 F.2d 797 (8th Cir. 1989) (court held that because

deference extends to post-riot "prophylactic or preventive measures," prison official's failure to ensure that inmates' jumpsuits were returned following a disturbance did not violate inmates' rights).

Certiorari should be granted to resolve the conflict between the court of appeals' opinion in this case, and the decisions of these other circuit courts.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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January 30, 2001.

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217 F.3d 726

Cal. Daily Op. Serv. 5309, 2000 Daily Journal D.A.R. 7059

United States Court of Appeals,
Ninth Circuit.

Dennis N. JOHNSON; Leonard Todek, individually and on behalf of all others similarly situated; Lawrence E. Cottle; John Pilafas, individually and on behalf of all others similarly situated; Robb Steir, individually and on behalf of all others similarly situated; Rodney Warner, individually and on behalf of all others similarly situated; Gary Elmore, individually and on behalf of all others similarly situated; Elias Gutierrez, Plaintiffs-Appellants,

v.

Samuel LEWIS, former director of the ADOC in his individual capacity; Terry Stewart, Director of the ADOC in his official and individual capacity; BILL GOTCHER, former warden of the ASP at Safford in his official and individual capacity; Glenn Davis, Deputy Warden of ASP Safford in his official and individual capacity; John Foote, Deputy Warden of the ASP Safford in his official and individual capacity; John Abbl, Captain DOC officer in his official and individual capacity; CSO Nations, CSO Marcias, CSOII Flores, SGT. Hull, DOC officers in their official and individual capacities; Blackie Hassenzeller, Lieutenant, a member of the ADOC Tactical Support Unit in his official and individual capacity; John Doe 1-10, DOC officers in their official and individual capacities; Joe Hawkins; Matthew Proto; Mark Wiley; Dennis Killa; James Bahn; Dwayne Morman; Dennis Grogg; Robert Stadler; J.C. Kenney, Defendants-Appellees.

Leroy Patrick BACA; Troy Hamilton, individually and on behalf of all others similarly situated; Paul Large,

individually and on behalf of all others similarly situated; Eric Baker; Larry G. Harper, individually and on behalf of all others similarly situated; Victor Lawrence Farber, Jr., Plaintiffs-Appellants,

v.

Terry STEWART, Director of the ADOC in his official and individual capacity; Bill Gotcher, former warden of the ASP Safford in his individual and official capacity; Frank Terry, deputy warden in charge of Tonto Unit in his official and individual capacity; CSO Ortiz, in his official and individual capacity; John Abbl, Captain in his official and individual capacity; CSO Thompson, in his official and individual capacity; Amarillus, Sergeant in his official and individual capacity; John Doe 1-10, CSOs in their official and individual capacity; CSO Thompson; Matthew Proto; Dennis Grogg; Darren McWhorter, CSOII; Armando Amarillas; Dwayne Morman, Defendants-Appellees.

Nos. 98-16821, 98-16851.
Argued and Submitted Dec. 9, 1999
Filed June 29, 2000

Paul Gattone, Southern Arizona People's Law Center, Tucson, Arizona, for the plaintiffs-appellants.

Bruce L. Skolnik, Assistant Attorney General, Tucson, Arizona, for the defendants-appellees.

Appeals from the United States District Court for the District of Arizona.

Before: SNEED, PREGERSON, and W. FLETCHER, Circuit Judges.

Opinion by Judge W. FLETCHER; Dissent by Judge SNEED.

W. FLETCHER, Circuit Judge:

These class actions arose from two disturbances in the Arizona State Prison in Safford, Arizona: one in August 1995 and the other in December of the same year. Although the district court resolved the cases separately, we consolidate them because they are factually similar and present identical legal issues. In each case, prison officials quelled the disturbance and then held all of the inmates in the affected unit out-of-doors while they investigated the incident and searched the prison buildings. The appellants, two classes of plaintiffs consisting of the inmates who were held outside, brought class actions against Arizona prison officials under 42 U.S.C. § 1983, asserting that the conditions under which they were held violated the Eighth Amendment's prohibition against cruel and unusual punishment. The district court granted summary judgment for the defendant prison officials in each case. We conclude that unresolved issues of fact preclude summary judgment in both cases. We therefore reverse and remand.

I

Because these cases were resolved at summary judgment, we relate the facts in the light most favorable to the prisoners as the non-moving parties. *See Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997).

On August 14, 1995, the Graham Unit of the Arizona State Prison in Safford, Arizona housed 638 inmates. One hundred of these prisoners lived in tents; the rest were housed in permanent dormitories. Dissatisfied with the conditions in the tents, some of the inmates began setting fire to the tents and nearby structures, throwing rocks

and cans, and wielding other makeshift weapons shortly after 7:00 p.m.

The prison's Tactical Support Unit (TSU) responded to the disturbance. Officials used the public address system to order all non-participating inmates to assemble at a designated location, but only 21 inmates reported. The TSU entered the prison yard at 8:30 p.m. Over the next several hours, it was able to restore order and regain control of the facility using non-lethal weapons. By 11:15 p.m., the TSU had evacuated all of the remaining buildings, had accounted for each of the 638 inmates, and was holding them handcuffed, shackled, and lying face-down on the ground in a central location in the prison yard.

Prison officials continued to hold the inmates handcuffed and prone, though no longer shackled, in the prison yard while they conducted an investigation of the disturbance. Until the riot participants could be identified, officials considered holding the inmates in the easily secured prison yard to be the safest alternative. Placing inmates back inside the eight dormitories would have fragmented staff and allowed inmates access to objects, possibly including shanks, that could be used to cause injury. No single building was large enough to hold all of the inmates except the Multi-Purpose Building, which housed a basketball court and had only one entrance. Although this building would have provided shelter, prison officials considered it too dangerous to use under the circumstances because housing the entire inmate population in a space of that size would have created crowded conditions and thwarted their need to maintain complete physical control over the prisoners in the wake of the riot.

While the prisoners waited in the yard, eleven investigators worked around the clock to interview each inmate individually. Other officials conducted an exhaustive search of the entire unit, including all of the living spaces and each prisoner's personal locker, for weapons and other contraband. The investigation lasted four days.

During those four days, the prisoners in the yard were exposed to the elements. The weather was humid, and the peak afternoon temperatures ranged up to 94 degrees, with nighttime lows around 70 degrees. Prison officials responded to the heat by "misting" the inmates with fire hoses. On the third day, officials distributed 36 bottles of sunscreen among the more than 600 inmates. Nonetheless, during one three-hour period on August 17, thirteen inmates required treatment for heat-related medical problems. The inmates were not provided with blankets or other coverings during the night. It rained during the night of August 16, but the inmates were given no means of shelter.

During some of the inmates' time in the yard, prison officials provided no toilet facilities. For the first night, inmates were not allowed to move from a prone position for any reason, even to relieve themselves. Sometime during the morning of August 15, two portable toilets were brought onto the yard. By then, some of the inmates had urinated or defecated into their clothing, which they would wear for the rest of the time in the yard. According to the inmates, the two portable toilets could not meet the demand of so many prisoners and were often unusable, despite periodic servicing. Sometime later on August 15, the situation improved when a few of the institution's

indoor toilet facilities that had been damaged during the riot were repaired and made available to the inmates.

For each meal, the inmates received sack lunches consisting of bologna sandwiches, milk, and an orange, but, according to the plaintiffs' deposition testimony, these lunches were routinely left in the sun for several hours before they were distributed, spoiling the meat and making much of the meal inedible. The inmates also claim that they received no drinking water until well into the second day, and that their access to drinking water was restricted thereafter. At the conclusion of the four-day riot investigation, the inmates were returned to their living quarters, and normal prison conditions were reestablished.

Several months later, on the evening of December 28, 1995, another disturbance erupted in a different unit of the Safford prison. Shortly before 6:00 p.m., between 70 and 80 of the 369 inmates in the Tonto Unit began fighting, throwing rocks, and destroying property. Again the TSU was successfully deployed, and it quickly regained control of the Unit. At 8:00 p.m., the TSU began evacuating the buildings of inmates and bringing them outdoors to the ballfield, where they were made to lie on the ground in handcuffs and ankle restraints. By midnight, all 369 inmates were lying prone on the ground. As they had in the aftermath of the Graham Unit disturbance, prison officials left the prisoners outdoors while they searched the buildings and tried to identify those inmates who had participated in the riot. This time, the officials' investigation lasted 17 hours.

During the hours the inmates spent outside, the temperature fell to 22 degrees. They were forced to lie on the ground in whatever clothing they had been wearing when the TSU cleared their buildings. When the inmates needed to urinate, the guards allowed them to get to their knees, crawl a few feet from where they lay, and relieve themselves on the ground. Because of their close proximity to each other, inmates sometimes urinated on their neighbors; even when they did not, the urine sometimes pooled and ran onto other inmates. At around 5:00 a.m., the guards briefly allowed the inmates to get to their feet to try to restore circulation and to relieve the pain and cramping they were experiencing in the cold. A few minutes later, the guards ordered the inmates to get back on the ground. When some of the prisoners refused, the guards forced compliance with tear gas, stinger balls, and knee knockers. Once the inmates were again on the ground, the guards assigned a few of them to enter the dormitories and get blankets for the rest.

By midday on December 29, the prison officials had concluded their investigation and identified the instigators of the disturbance. Officials began returning the inmates to their dormitories around 1:00 p.m.

The 638 inmates incarcerated in the Graham Unit during the August 1995 riot and its aftermath filed a class action against Arizona prison officials in federal district court under 42 U.S.C. § 1983. Inmate Dennis Johnson is the lead plaintiff for the Graham Unit class. The 369 Tonto Unit inmates involved in the December 1995 incident filed a similar class action, for which inmate Leroy Baca is the lead plaintiff. Each complaint alleges that the

defendant prison officials subjected the plaintiff class to unconstitutional conditions in the prison yard.

On August 26, 1998, the district court entered orders granting summary judgment for the defendants in each action. The district court concluded that, because prison officials had provided some food, drinking water, sanitation, medical care, and protection from the elements during the four days that the Graham Unit prisoners were held outdoors, the *Johnson* class had failed to provide evidence of sufficient harm to trigger the protections of the Eighth Amendment. Similarly, the court held that, because some of the Tonto Unit prisoners were dressed in jackets, hats, and gloves; because all of the inmates eventually received blankets; and because the inmates were subjected to cold temperatures for only one night, the *Baca* class also had failed to demonstrate sufficient harm to violate the Eighth Amendment.

Timely appeals were taken. We have jurisdiction to review the judgments of the district court under 28 U.S.C. § 1291, and we reverse.

II

The Eighth Amendment prohibits cruel and unusual punishment of a person convicted of a crime. U.S. Const. amend. VIII. The Amendment has not been restricted to cases challenging the length of a sentence or the nature of a punishment. Where the conditions of confinement are challenged rather than the confinement itself, a plaintiff must make two showings. First, the plaintiff must make

an "objective" showing that the deprivation was "sufficiently serious" to form the basis for an Eighth Amendment violation. *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Second, the plaintiff must make a "subjective" showing that the prison official acted "with a sufficiently culpable state of mind." *Id.* The district court in these cases did not reach the question of the second required showing because, in its view, the deprivations alleged by the plaintiff classes were not sufficiently serious to violate the Eighth Amendment.

Although the routine discomfort inherent in the prison setting is inadequate to satisfy the objective prong of an Eighth Amendment inquiry, "those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)). Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety. *See Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982).

The circumstances, nature, and duration of a deprivation of these necessities must be considered in determining whether a constitutional violation has occurred. "The more basic the need, the shorter the time it can be withheld." *Hoptowit*, 682 F.2d at 1259; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1314, *as amended*, 75 F.3d 448 (9th Cir. 1995) ("[A] lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment."). For example, the

Eighth Circuit found that the Eighth Amendment had been violated where prison officials required inmates to remain outdoors in subfreezing temperatures for less than two hours, even though the inmates were provided with hip-length, lined denim coats and allowed to move freely. *See Gordon v. Faber*, 973 F.2d 686, 687 (8th Cir. 1992). Similarly, we have suggested that depriving an inmate of a jacket could violate the Eighth Amendment under some weather conditions. *See Walker v. Sumner*, 14 F.3d 1415, 1421 (9th Cir. 1994). More modest deprivations can also form the objective basis of a violation, but only if such deprivations are lengthy or ongoing. *See Keenan*, 83 F.3d at 1090-91.

The relatively brief amounts of time the members of the plaintiff classes spent in the prison yard in these cases preclude them from stating Eighth Amendment claims for minor deprivations. These plaintiffs, however, provide evidence of substantial deprivations of shelter, food, drinking water, and sanitation. This evidence, if believed, shows harm of sufficient magnitude to satisfy the objective prong of an Eighth Amendment violation.

The *Johnson* plaintiffs provide sworn deposition testimony and affidavits that they did not receive protection from the elements sufficient to ward off heat-related illnesses. They testified that they received inedible food and inadequate drinking water for four days. They also testified that they did not receive adequate access to toilets to avoid soiling themselves, and they were not allowed to clean themselves thereafter. If believed, this evidence would establish deprivations sufficiently serious to satisfy the objective component of an Eighth Amendment claim.

The state has provided videotape evidence demonstrating that, repeatedly during the four days, some of the *Johnson* plaintiffs did receive food, drinking water, sunscreen, "misting," and access to toilets. This videotape evidence is important and may eventually be dispositive in favor of the state. At this stage of the litigation, however, it does not overcome the plaintiffs' evidence. Establishing that some needs of some plaintiffs were met at some times during the four days does not establish that the plaintiffs received adequate edible food and adequate amounts of drinking water, that the sunscreen or "misting" provided sufficient protection from the sun and heat, or that the sanitation was adequate. Drawing all reasonable inferences from the evidence in favor of the nonmoving parties, as we must, *see Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 817 (9th Cir. 1999), we conclude that the videotape falls short of negating the prisoners' claims. *See Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000). The actual conditions to which the *Johnson* plaintiffs were subjected on the prison yard are therefore disputed questions of material fact that cannot be resolved at summary judgment. *See* Fed.R.Civ.P. 56(c).

The *Baca* plaintiffs also provide sufficient evidence of substantial deprivations of basic human needs to withstand summary judgment. They testify principally to exposure to subfreezing temperatures and the lack of access to toilets. As in *Johnson*, the state supplied a videotape of the inmates on the prison yard. The videotape shows some prisoners wearing jackets and gloves. Viewed in the light most favorable to the plaintiffs, however, the videotape establishes no more than that some,

but not all, members of the plaintiff class were wearing winter clothing. The state also maintains that providing the prisoners with blankets in the early morning adequately protected them from the cold, but it is undisputed that the blankets were not distributed until the inmates had been lying motionless in the dirt in subfreezing temperatures for five to nine hours. The extent and adequacy of the protection the inmates received from the cold is therefore a disputed question of fact. Moreover, although we have no doubt that toilets can be unavailable for some period of time without violating the Eighth Amendment, the plaintiffs in this case testify that the state imposed conditions inescapably resulting in prisoners wetting each other with urine. This evidence, if believed, would allow a fact-finder to conclude that the plaintiffs suffered a sufficiently serious deprivation to violate the Eighth Amendment.

III

In addition to a sufficiently serious objective harm, an Eighth Amendment violation requires a showing that the subjective state of mind of the prison officials was culpable. *See Wilson*, 501 U.S. at 298-99, 111 S.Ct. 2321. The state-of-mind requirement is not constant, but instead varies with the circumstances of the claim.

In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Supreme Court determined that "deliberate indifference" to prisoners' serious medical needs violates the Eighth Amendment. *Id.* at 105, 97 S.Ct. 285. The deliberate indifference standard requires the

plaintiff to prove that "the official knows of and disregards an excessive risk to inmate health or safety. . . ." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Ten years later, when confronted with materially different circumstances, the Court departed from the "deliberate indifference" standard it had established in *Estelle*. In *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the Court refused to find a violation of the Eighth Amendment where prison officials had shot an inmate while they tried to rescue a guard held hostage during a riot, despite the fact that prison officials had clearly shown deliberate indifference to that inmate's safety. Explaining that the state-of-mind requirement is context-dependent, the Court held:

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 320-21, 106 S.Ct. 1078 (internal citations omitted). In emergency circumstances, such as those that exist during a prison uprising, where prison officials must weigh the competing institutional interests of ensuring the safety of staff, visitors, and inmates, and where life-and-death decisions must be made quickly, the Court found that the deliberate indifference standard does not

"adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.* at 320, 106 S.Ct. 1078.

In contrast, where inmates challenge the conditions of confinement, the Court has applied the deliberate indifference standard rather than the heightened *Whitley* standard. *See Wilson*, 501 U.S. at 303, 111 S.Ct. 2321. The Court in *Wilson* reasoned that the emergency circumstances facing prison officials while quelling a disturbance would, as a general matter, be absent when officials decided such matters as what sort of food to supply, the temperature at which to keep the prison cells, and the kind of clothing to issue. *See id.*

In the cases now before us, the district court did not resolve the question of the prison officials' mental state because it incorrectly held that the prisoners could not prove a sufficiently serious objective harm. But the district court did explain its view, in reliance on *Whitley*, "that a heightened standard of deference applies to the post-riot actions taken by the prison officials immediately after the riot, although it may be less than the standard applied in the face of immediately exigent circumstances."

In our view, the exigent circumstances the prison officials faced during the riots persisted until the officials were able successfully to remove the prisoners from the buildings and secure them in the prison yard. The prison officials' actions and accompanying state of mind should therefore be measured against the *Whitley* standard for an

Eighth Amendment violation until that point. Under the *Whitley* standard, those actions did not violate the Eighth Amendment because the officials were motivated by the sorts of penological and safety concerns which are committed to the discretion of prison officials and to which we give considerable deference.

When the inmates were in the yard, however, they were handcuffed, prone, and under armed guard. In these circumstances, the inmates presented no further danger to prison staff, the public, or each other, and prison officials were no longer required to make split-second, life-and-death decisions. Once the inmates were thus secured in the yard, the state-of-mind requirement that sufficed to show an Eighth Amendment violation was deliberate indifference.

In *Farmer*, the Supreme Court held that to act with deliberate indifference, an official must have actual knowledge of an excessive risk to inmate health or safety and must deliberately disregard that risk. *See* 511 U.S. at 837, 114 S.Ct. 1970. In these cases, the plaintiffs must show that the defendant officials had actual knowledge of the plaintiffs' basic human needs and deliberately refused to meet those needs. Whether an official possessed such knowledge "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. . . . " *Id.* at 842, 114 S.Ct. 1970.

In the cases before us, a fact-finder could conclude, based on the evidence presented by the plaintiffs seen in its most favorable light, that the defendant prison officials had actual knowledge of the inmates' exposure to the elements and need for sanitation, edible food, and

adequate drinking water, and that they intentionally disregarded these conditions. In the *Johnson* case, inmate Johnson testified in his deposition that he heard defendant Sam Lewis, the Director of the Department of Corrections, say, "Keep them down for four days at least." He also heard guards saying "Let's keep them down, let's hurt them." In his deposition, then-Deputy Warden Glen Davis admitted that officials determined on the night of the riot – before they could know how long the investigation would take – to keep the inmates outdoors for at least three days. Davis also wrote a post-incident report in which he noted that the inmates now "have a clear understanding from this incident that type of behavior will not be tolerated. Life was not good for these inmates. They are now clear on who is administering the Institution, the consequences forthcoming from their actions and the absolute power of our Tactical Support Units." From this evidence, a finder of fact could conclude that the defendants deliberately ignored, perhaps even intentionally imposed, the sorts of conditions the *Johnson* plaintiffs claim to have experienced during their four days in the prison yard.

The *Baca* plaintiffs present similar evidence. Inmate Victor Farber provides an affidavit in which he relates that the inmates were so cold by the time of the renewed disturbance at 5:00 a.m. that some of them asked to be shot, and "Officer Ortiz laughed at the inmates [and] said, 'If we shoot you with these guns you wont [sic] get to go to the hospital – you'll just lay there in pain.' " Inmate Larry Harper relates hearing a guard say that "he thought we deserved the treatment we received, if a few people cause a disturbance everyone will suffer, that he

received a lot of overtime and that we should have been left out there for two weeks." Inmate Baca testifies that Deputy Warden Terry threatened to keep the inmates outside for seven days if there were any more disturbances. Inmate Large testified in his deposition that he remembered a guard telling him that the prisoners "could go to the bathroom in [their] pants and [they] could freeze."

IV

The Eighth Amendment does not tolerate prison officials' deliberate indifference, in the absence of exigent circumstances, to substantial deprivations of adequate shelter, food, drinking water, and sanitation. Because the plaintiff classes present evidence that, if believed by a fact-finder, would demonstrate that the defendant prison officials deliberately failed to rectify severe deprivations of basic human necessities of which they had actual knowledge, summary judgment for defendants was improperly granted.

We REVERSE and REMAND these cases for further proceedings consistent with this opinion.

SNEED, Circuit Judge, Dissenting:

"[O]nly the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). In these cases, the deprivations of shelter were necessary and the alleged deprivations of adequate food, water and sanitation were not wanton. I therefore dissent.

Shelter

It is well-settled that "[p]rison officials should be accorded wide-ranging deference in the adoption and execution of policies and practices that *in their judgment* are needed to preserve internal order and discipline to maintain institutional security." *Whitley*, 475 U.S. at 322, 106 S.Ct. 1078 (citing *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)) (emphasis added). Indeed, we have held that "prison officials have a *right and a duty* to take the necessary steps to reestablish order in a prison when such order is lost." *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9th Cir. 1982) (emphasis added). The deference accorded to prison officials "extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline." *Whitley*, 475 U.S. at 322, 106 S.Ct. 1078. "It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Id.*

The prison officials made considered choices that penological and safety concerns mandated that inmates be kept outdoors during the investigations of the riots. The decisions were necessary steps to reestablish order in the prisons where order had been lost. The prisoners in both of these cases rioted and caused significant damage to the prison facilities. In *Johnson*, the rioters set fires to their own dwellings, including tents and dormitories, and various buildings that housed offices and other facilities, including records, mail and property, security, programs,

education, the law library, and the church. The tents and buildings were destroyed in their entirety. In all, the rioting inmates destroyed State property worth over one million dollars. Similarly in *Baca*, a group of 70-80 inmates engaged in widespread fighting, throwing rocks, and breaking fire extinguishers and windows.

In both cases, the prison officials believed it necessary to keep the inmates together until the riot participants could be segregated from the non-participants. The officials properly chose to keep the inmates outdoors in a large unobstructed field. No safe indoor facilities were available; the ability of prisoners to obtain potential weapons was greatly reduced; and it enabled the officers to guard the inmates from a safe distance. These objectives were neither illegitimate nor does the evidence suggest that their decisions were made in bad faith. Therefore, these decisions are entitled to extensive deference. We should not at this distance freely substitute our judgment for theirs.

Our deference of course has limits. A line must be drawn somewhere. For example, bad faith might be presumed in the absence of extraordinary circumstances if prison officials asserted that inmates needed to be maintained in this position for months. Four days, however, is relatively brief and not an unreasonable length of time to restore order to a prison following a riot. *Cf. Hoptowit*, 682 F.2d at 1259 (lockdown after riot lasted at least three weeks). Thus, in these cases, the deprivations of shelter were for reasonable periods of time, during which the prison officials made considered choices consistent with sound penological and safety concerns.

Food, Water and Sanitation

The alleged deprivation of adequate food, water and shelter was not wanton. Whether conduct can be characterized as " 'wanton' depends upon the constraints facing the official." *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). The general rule is that a prison official acts wantonly with respect to supplying inadequate food, water and shelter if he has actual knowledge of an excessive risk to inmate health or safety and deliberately disregards that risk. *See Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (articulating the "deliberate indifference" standard). There is an "emergency exception" to the general rule that applies to these cases. It provides that when prison officials are confronted with constraints "materially different" than those they generally face, wantonness consists of acting "maliciously and sadistically for the very purpose of causing harm." *Wilson*, 501 U.S. at 302-03, 111 S.Ct. 2321. Here, during the time that the inmates were being held outdoors the prison officials were faced with constraints "materially different" than those they generally face. The proper inquiry, therefore, is whether the alleged deprivations were done maliciously and sadistically for the very purpose of causing harm. They were not.

The exhaustive videotape evidence shows that, despite the unusual situation confronting the prison officials, they attempted to provide the inmates with adequate food, water and sanitation during the entire time the inmates were being held outside. For example, two portable toilets were brought into the yard the morning

after the riots in *Johnson*. The complaint alleges that this was too late because some inmates had already urinated or defecated into their clothing by that time. The officials were quite aware that it was necessary to acquire portable toilets that evening and were able to get them on-site the very next day. They did not act maliciously and sadistically for the very purpose of causing harm. Rather, because of the rioting, they were reacting to a situation materially different than what they would normally encounter on a day to day basis.

The complaint properly alleges that the two portable toilets could not meet the demand of so many prisoners and were often unusable despite periodic servicing. However, sanitation was so limited for only one morning. By the afternoon after the riot, the prison officials had repaired and made available some of the indoor toilets that had been damaged during the riots. The prison officials did not act maliciously and sadistically by providing only two portable toilets during the morning after the riot while the permanent facilities were rapidly being repaired.

The inmates alleged that the food was inadequate because it was left in the sun for several hours prior to distribution. This, at best, is doubtful. Several hours in the sun usually does not render a sack lunch inedible. Nevertheless, even were it true that the lunches were "inedible" due to a delay, the delay was partially a consequence of being forced to pass out sack lunches to over 600 inmates while maintaining security. Moreover, it should be irrefutable that one who has substantially disrupted a restaurant should not complain about the service being slow.

The inmates also claimed, despite videotape evidence showing water routinely being provided to the inmates throughout their time in the yard, that they did not have adequate access to water. The majority simply dismisses the videotape evidence by saying that it merely shows that many inmates, but not necessarily all, received water. No doubt some inmates got water before others. Also, it is likely that the water service was slow. Nonetheless, there is no showing that the distribution of water discriminated between the participants and the non-participants in the riots.

In sum, the complaints do not show that the prison officials acted maliciously or sadistically for the very purpose of causing harm. At most the evidence shows that the temporary conditions following the riots was not perfect. How could it have been otherwise? The majority simply ignores the constraints the prison officials were faced with and presumes that conditions should have been normal the moment the officials "were able successfully to remove the prisoners from the buildings and secure them in the prison yard." Maj. Op. 734. This approach is unrealistic because it improperly holds the prison officials to a standard of conduct that will be difficult for them to meet. Accordingly, I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DENNIS JOHNSON, et al.,	CIV No. 96-463-TUC-FRZ
Plaintiffs,	**ORDER**
vs.	(Filed Aug. 26, 1998)
SAMUEL LEWIS, former director of the Arizona Department of Corrections, in his official and individual capacity, et al.,	
Defendants.	

I. Factual Background

Defendants allege that at approximately 7:13 p.m. in the evening of August 14, 1995, prisoners in the minimum security Graham Unit of the Arizona State Prison Complex in Safford, Arizona, began to set fire to the tents where they were housed as well as to other modular structures in the unit (mail and property room, church, offices, law library, programs, and education buildings). The inmates looted the unit's store, and destroyed windows, toilets and other facilities. At the time, 638 inmates were housed in the Graham Unit and of these, 100 lived in ten (10) army tents. This was apparently not a riot where one group was fighting another, but a sort of protest precipitated by dissatisfaction with conditions in the unit (the heat in the tents and the fact that inmates were locked out of the tent area during the working day).

The prison officials responded to the riot by deploying the Tactical Support Unit (TSU) to perform a clockwise sweep of the unit and gather all the residents into one outside area. Before the TSU entered the yard, announcements were made over the public address system inviting all non-participating inmates to assemble outside of the Education Building. Twenty-one inmates responded as non-participants. The TSU then entered the burning Graham Unit at 8:30 p.m., exploding diversionary devices in the buildings before they entered them. TSU officers met little resistance from the prisoners in the buildings, but found prisoners throwing rocks and soda cans in the yard. Inmates in the yard were ordered to stop throwing things, and when they failed to do so, TSU officers fired tear gas, knee knockers and stinger balls at the rioters. Prisoners were moved to a grassy area in the unit, handcuffed behind their backs and ordered to lay on their stomachs. By 11:15 p.m., all prisoners in the Graham Unit were accounted for and under guard.

The prisoners were held in the outside area for four days until the investigation of the riot (which began late on the night of the riot) was completed. Defendants allege that this was necessary for a number of reasons including the length of time needed to investigate, the need to control the population, and the safety of the prisoners. Plaintiffs allege violations of the Fourteenth and Eighth Amendments and 42 U.S.C. § 1983. Plaintiffs accuse the prison officials of employing excessive force, denying them access to toilets, denying them food and water, denying them medical care, and forcing them to sit in the heat with no covering during extreme summer temperatures. Defendants' Exhibit B, a videotape of some

of the incident and events following, shows water, toilets, medical care, food, sunscreen and other relief being provided to the inmates.[1] Pending before the Court is Defendants' Motion for Summary Judgment. A hearing was held on July 13, 1998.

II. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Supreme Court's 1986 trilogy of cases, *Celotex Corp. v. Caltrett,* [sic] 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S 242, 255 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), requires that a party seeking summary judgment identify those parts of the record that indicate the absence of a genuine issue of material fact (*Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1047 (9th Cir. 1995)). Once the moving party has made this showing, the nonmoving party must designate which specific facts show that there is an issue for trial. *Celotex*, 477 U.S at 324 *quoting* Fed.R.Civ.P. 56(e). The moving party is held to a

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[1] Plaintiffs' videotape exhibit features the prison officials repeatedly addressing their wards with foul and derogatory language. (Plaintiffs' Exhibit 10). While such behavior does not necessarily rise to a Constitutional offense, *see Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), it certainly reflects poorly on the officials and falls far short of the expectations of professional conduct most citizens have regarding law enforcement officers.

strict standard and any doubts as to the existence of a genuine issue of material fact will be resolved against him. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992); *Liberty Lobby*, 477 U.S. at 255. However, when a movant has supported a motion for summary judgment with affidavits or other fact, the non-movant may not merely rest upon the pleadings but must demonstrate that the facts are actually in issue. *Matsushita*, 475 U.S. at 586. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted).

III. Analysis

The Eighth Amendment's Cruel and Unusual Punishment Clause has been interpreted to proscribe certain intentionally imposed conditions of confinement as well as deliberate indifference to serious medical needs of prisoners whether or not there was an express intent to inflict pain. *See generally, Ingraham v. Wright*, 430 U.S. 651 (1977); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Rhodes v. Chapman*, 452 U.S. 337 (1981). Plaintiffs argue that the actions of prison officials in response to and following the summer riot constituted cruel and unusual punishment. The analysis in *Whitley v. Albers* 475 U.S. 312 (1986), governs this case.[2] In that case, the Supreme Court, in reviewing a judgment on the pleadings, wrote:,

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[2] *Whitley* dealt with a trial court's granting of directed verdict (judgment as a matter of law) under Rule 50, Fed.R.Civ.P., for the prison officials. On a motion for judgment as a matter of law, the Court is required to resolve all inferences in favor of the non-movant. On a motion for summary

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." . . . [S]uch factors as the need for application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted are relevant to that determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur . . .
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> When the "ever-present potential for violent confrontation and conflagration" erupts into actual unrest and conflict, the admonition that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators" carries special weight . . . That

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judgment, the Court treats the facts in a light most favorable to the non-movant but is not required to assume the truth of those facts and may reject certain facts which can not be supported or are not susceptible to any inference in favor of the non-movant. *Whitley* can therefore be applied to summary judgment cases with no apparent prejudice to the non-movant, since the analysis there is based on a standard essentially the same as on summary judgment.

> deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline . . . it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.
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> * * *
>
> Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury.

Whitley, 475 U.S at 320-22 (citations omitted). At the hearing, Defendants argued that where *Whitley* does not control the analysis, a standard of "deliberate indifference" is applied under *Estelle v. Gamble*. Defendants argue that even under the deliberate indifference standard, the facts do not support a claim of cruel and unusual punishment because the prison officials took great pains to attend to the basic needs of the prisoners and provided comfort measures such as sun screen lotion and "misting" with hoses.

The Court concludes that *Whitley* is dispositive of the Plaintiffs' claim that the prison officials used excessive force in responding to the riot. Under these exigent circumstances, the prison officials' use of crowd control devices and non-lethal weapons was appropriate and justified and the Court will not substitute its own opinion for the informed judgment of the prison officials in this

area. The Court also concludes that a heightened standard of deference applies to the post-riot actions taken by the prison officials during the four days immediately after the riot, although it may be less than the standard applied in the face of immediately exigent circumstances. The Supreme Court wrote:

> The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged. The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury" can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.

Whitley, 475 U.S. at 320. In the wake of the riot, there were apparent concerns of control and safety that were not "emergency" concerns but which were more important than the typical concerns of administering the prison. The choices being made by the prison officials were not related to routine prison operations and the prison officials were clearly doing what they could to balance "competing institutional concerns." *Id.* Under these circumstances, they are entitled to a wider range of

deference than in the normal situation, but to less deference than they would be in the heat of a riot or emergency.

For any kind of Eighth Amendment analysis, Plaintiffs must show that there was unnecessary and wanton infliction of pain. The video exhibits shows no purposeful infliction of pain on the inmates in the video. On the other hand, a heat stroke is a very serious injury and the prison officials would be courting disaster to purposefully expose the inmates to such a risk if they had better alternatives readily available.

Nonetheless, the Defendants have given various justifications for holding the prisoners outdoors, all of which appear rational and do not suggest either deliberate indifference or a malicious motivation. Prison administrators are accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. at 547. Defendants were required to interview approximately 600 inmates, none of whom admitted involvement in the arson, but who continued to implicate other participants until the interviews were finished. The process took four days and the participating inmates could not be segregated until they were identified. For their part, Plaintiffs argue that the actions had no penalogical justification and that they are prepared to offer expert opinion on this point. Plaintiffs argue that the procedure violated the Eighth Amendment because it violated basic standards of human decency. *See Troppe v. Dulles*, 356 U.S. 86, 101 (1958).

The danger emphasized by Plaintiffs is that the State can easily offer plausible justifications which are in fact pretextual and use tactics such as leaving prisoners exposed to the heat or the cold as punishment without affording due process, and arguably offending substantive due process and the Eighth Amendment. Plaintiffs state that they were, in fact, subjected to cruel and unusual punishment and that this raises a question of intent, which is a subjective inquiry of fact and which therefore precludes summary judgment. As evidence that there was an intent to inflict pain, Plaintiffs point to the Summarization of Disturbance prepared by Deputy Warden Glenn Davis in which he observed under the caption "lessons learned" that "life was not good" for the prisoners after the riot. (Plaintiff's Exhibit 4). Normally, a question of intent may not be disposed of on summary judgment. *Alexander v. City of San Francisco*, 29 F.3d 1355, 1364 (9th Cir. 1994). However, without showing either pain or denial of basic needs, Plaintiffs cannot show an Eighth Amendment violation.

Plaintiffs admit that some of their basic needs were met. *See Touissant v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986) (holding that prison officials must provide prisoners with adequate "food, clothing, shelter, sanitation, medical care and personal safety."). Because the basics were provided, Plaintiffs' argument is reduced to a wish list of items which could have been provided (air conditioning, pillows, blankets, change of clothes, showers). This kind of hindsight criticism of prison officials has been rejected as a basis for an Eighth Amendment claim. *Whitley*, 475 U.S. 322. Defendants argue that the pragmatic concerns of the situation (safety, control,

logistics) precluded allowing prisoners to change their clothes or take showers. When considering conditions of confinement claims, a court should consider the amount of time to which a prisoner was subjected to the condition. *Hoptowit v. Ray*, 682 F.2d 1237, 1258 (9th Cir. 1982). In this case, Plaintiffs were not subjected to the conditions in question longer than four days.

Whitley requires the Court to view the actions of the prison officials with some deference. The Court concludes that the exigent circumstances in this case require their actions to be reviewed with deference, that the actions of the prison officials were based on legitimate penalogical concerns, that the basic needs of the prisoners were attended to, that the hardships lasted for a short time, and that there is therefore no basis on which to find an Eighth Amendment violation. At the hearing, Plaintiffs argued that the fact the prison officials provided some of the basic necessities in no way obviates the callousness and wantonness of their actions. However, the order of the Court's inquiry is exactly the opposite. Without first finding a harm, it is not necessary for the Court to inquire as to intent.

A second question raised here is whether the restraints were necessary for a period of four days. The deprivation of liberty effected by physical restraint or isolation may be permissible for a short duration of time, even without the extenuating circumstances the prison allegedly encountered in the aftermath of the riot. *See, e.g., Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1994) (finding a safety cell used to control violent inmates for short periods of time was constitutionally justifiable).

The Court thus concludes that Plaintiffs were not subjected to cruel and unusual punishment here, where the restraint was necessary to ensure safety and control after a riot and lasted for a short time.

IV. Conclusion

In sum, the Court views the actions taken by the prison officials with special deference towards those actions taken in the midst of the riot which were related to regaining control and with somewhat less deference following that point when control was acquired. Viewing the actions with this deference, the Court then takes the facts alleged in a light favorable to the non-movants. However, those facts which cannot be disputed are not material issues of fact. The video exhibits put many facts beyond dispute. Additionally, because Plaintiffs admit that their most basic needs were met and because the hardships they suffered have been explained by legitimate penalogical concerns which are entitled to deference under *Whitley*, and because the hardships lasted for only a short time, the Court concludes that the Defendants are entitled to summary judgment.

IT IS ORDERED that Defendants' Motion for Summary Judgment is **GRANTED** and that this case is hereby **DISMISSED**.

DATED this 24th day of AUGUST, 1998.

/s/ Frank R. Zapata
FRANK R. ZAPATA
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LEROY BACA, et al., Plaintiffs, vs. TERRY STEWART, Director of the Arizona Department of Corrections, in his official and individual capacity, et al., Defendants.	CIV No. 96-464-TUC-FRZ **ORDER** (Filed Aug. 26 1998)

I. Factual Background

At approximately 5:50 p.m. in the afternoon of December 28, 1995, widespread fighting along racial lines erupted among the prisoners in the Tonto Unit of the Arizona State Prison at Safford. Inmates were allegedly throwing rocks, swinging socks full of rocks, and breaking fire extinguishers and windows. Orders were given over the public address system for all non-participants to go to the ballfield and lay down. At 6:48 p.m., the prison's Tactical Support Unit (TSU) entered the yard and ordered inmates to lay on the ground. A tear gas cannis-ter[sic] was fired at a group which defied the order, after which, all of the prisoners complied. At 8:00 p.m., the TSU began clearing all buildings in the unit and escorting the prisoners to the ballfield where they were cuffed with knee and wrist restraints. By 12:10 a.m., all prisoners were accounted for.

Force was used again at 5:17 a.m. in the morning of December 29, 1995 in response to a large group of inmates who defied direct orders to lay down on the ground. After giving warnings, the TSU officers fired a tear gas cannister, a diversionary device, a set of knee knockers, and three sting ball devices (one of which did not detonate).

The Tonto Unit housed 369 inmates who were interviewed by four investigators beginning the night of the riot. The process was completed by midday on December 29, 1995 and the riot participants were segregated and the remaining inmates returned to their indoor housing. Plaintiffs allege violations of the Fourteenth and Eighth Amendments and 42 U.S.C. § 1983. The crux of Plaintiff's complaint is that:

> Despite the availability of housing at the unit, for over 36 hours all the prisoners were kept outdoors and handcuffed in the near freezing December weather without sufficient and necessary food, water, blankets or sanitary facilities. Arizona Department of Corrections . . . created this scenario to teach all the prisoners a "lesson."
>
> Defendants' actions were inconsistent with all norms of human decency and a civilized society and served no legitimate purpose. They were cruel and unusual and deliberately indifferent to the health and safety of Plaintiffs.

(Second Amended Complaint at pp. 1-2). Plaintiffs allege that they were forced to endure bitterly cold temperatures during the time they were held outside (approximately 8:00 p.m. on December 28, 1995 to 6:00 p.m. on

December 29, 1995), that they were denied adequate clothing for the cold, and were given blankets which were "insufficient." They also allege that they were forced to urinate and defecate in their clothing or on the ground while handcuffed on their knees. They further allege that they were denied medical care while exposed to the extreme temperatures. Plaintiffs allege that the above actions of the prison caused an unreasonable risk of substantial harm to them, humiliation to all, and injury to some. They further contend that the prison is likely to repeat this type of behavior.

Defendants allege that the inmates were permitted to urinate "outdoors" immediately after they were brought on the ballfield, and that later in the morning, officers escorted inmates to the bathroom facilities as needed. (Motion for Summary Judgment at 8). They also demonstrate with affidavits that the ankle cuffs were removed from inmates to allow them to urinate in front of themselves "or further away." (Plaintiff's Exhibit E at 35, 43-44, Exhibit F at 45). Defendants support their contention that medical treatment was provided for those who availed themselves of it with exhibits including a video. (Defendants' Exhibit C). The video also demonstrates that most of the inmates were wearing cold weather clothing, jackets and gloves. Blankets were distributed to the inmates at 5:00 a.m. in the morning. Pending before the Court is Defendants' Motion for Summary Judgment. A hearing was held July 13, 1998.

II. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Supreme Court's 1986 trilogy of cases, *Celotex Corp. v. Caltrett,* [sic] 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S 574 (1986), requires that a party seeking summary judgment identify those parts of the record that indicate the absence of a genuine issue of material fact (*Brinson v. Linda Rose Joint Venture,* 53 F.3d 1044, 1047 (9th Cir. 1995)). Once the moving party has made this showing, the nonmoving party must designate which specific facts show that there is an issue for trial. *Celotex*, 477 U.S. at 324, *quoting* Fed.R.Civ.P. 56(e). The moving party is held to a strict standard and any doubts as to the existence of a genuine issue of material fact will be resolved against him. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992); *Liberty Lobby*, 477 U.S. at 255. However, when a movant has supported a motion for summary judgment with affidavits or other fact, the nonmovant may not merely rest upon the pleadings but must demonstrate that the facts are actually in issue. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. at 2511 (citations omitted).

III. Analysis

The Eighth Amendment's Cruel and Unusual Punishment Clause has been interpreted to proscribe certain intentionally imposed conditions of confinement as well as deliberate indifference to serious medical needs of prisoners whether or not there was an express intent to inflict pain. *See generally, Ingraham v. Wright*, 430 U.S. 651 (1977); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Rhodes v. Chapman*, 452 U.S. 337 (1981). Plaintiffs argue that the actions of prison officials in response to and following the riot constituted cruel and unusual punishment. The analysis in *Whitley v. Albers*, 475 U.S. 312 (1986), governs this case.[1] In that case, the Supreme Court, in reviewing a judgment on the pleadings, wrote:

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied

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[1] *Whitley* dealt with a trial court's granting of directed verdict (judgment as a matter of law) under Rule 50, Fed.R.Civ.P., for the prison officials. On a motion for judgment as a matter of law, the Court is required to resolve all inferences in favor of the non-movant. On a motion for summary judgment, the Court treats the facts in a light most favorable to the non-movant but is not required to assume the truth of those facts and may reject certain facts which cannot be supported or are not susceptible to any inference in favor of the non-movant. *Whitley* can therefore be applied to summary judgment cases with no apparent prejudice to the non-movant, since the analysis there is based on a standard essentially the same as on summary judgment.

in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." . . . [S]uch factors as the need for application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted are relevant to that determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur . . .

When the "ever-present potential for violent confrontation and conflagration" erupts into actual unrest and conflict, the admonition that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators" carries special weight . . . That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline . . . it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

* * *

Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury.

Whitley, 475 U.S. at 320-22 (citations omitted). At the hearing, Defendants argued that where *Whitley* does not control the analysis, a standard of "deliberate indifference" is applied under *Estelle v. Gamble*. Defendants argue that even under the deliberate indifference standard, the facts do not support a claim of cruel and unusual punishment.

Plaintiffs emphasize 1) the excessive application of force, 2) the exposure to cold, and 3) unnecessary restraint and related hygiene issues. The Court concludes that *Whitley* is dispositive of the Plaintiffs' claim that the prison officials used excessive force in responding to the riot. Under these exigent circumstances, the prison officials' use of crowd control devices and non-lethal weapons was appropriate and justified and the Court will not substitute its own opinion for the informed judgment of the prison officials in this area. Prison administrators are accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. at 547.

The Court also concludes that a heightened standard of deference applies to the post-riot actions taken by the prison officials immediately after the riot, although it may be less than the standard applied in the face of immediately exigent circumstances. The Supreme Court wrote:

> The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the

> kind of conduct against which an Eighth Amendment objection is lodged. The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury" can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.

Whitley, 475 U.S. at 320. In the wake of the riot, there were concerns of control and safety that were more important than the typical concerns of administering the prison. The choices being made by the prison officials were not related to routine prison operations and the prison officials were clearly doing what they could to balance "competing institutional concerns." *Id.* Under these circumstances, they are entitled to a wider range of deference than in the normal situation.

To prevail on their Eighth Amendment claim, Plaintiffs must show that there was unnecessary and wanton infliction of pain. The Court takes the allegation of exposure to cold as a very serious allegation. *See Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) ("The Eighth Amendment guarantees adequate heating."). Plaintiffs cite *Gordon v. Faber*, 973 F.2d 686 (Eighth Cir. 1992), where a district court held that the plaintiff prisoners' Eighth Amendment rights were violated when they were held outside in freezing temperatures for one hour without proper protection. In this case, the video tape shows that

the prisoners were dressed in cold weather clothing (jackets, hats, gloves) and received blankets. Accordingly, there is scant evidence that the actions of the prison officials resulted in the infliction of pain. Moreover, the period that the prisoners were subjected to cold temperatures was short – less than 24 hours. When considering conditions of confinement claims, a court should consider the amount of time to which a prisoner was subjected to the condition. *Hoptowit v. Ray*, 682 F.2d 1237, 1258 (9th Cir. 1982). In short, the exposure to cold temperatures for this short of time, and in light of the legitimate penalogical justifications related to the riot, does not rise to the level of an Eighth Amendment violation.

As to the claim of cruel and unusual punishment through unnecessary restraint, the Court finds that the penalogical concerns warranted the actions taken, that the prison officials paid adequate concern to the medical and other needs of the prisoners, and that any suffering was for a short duration and did not amount to an Eighth Amendment violation. Quoting *Whitley* once more: "The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strictest sense." 475 U.S. at 319. Accordingly, the Court finds that the knee restraints and wrist restraints were not cruel and unusual punishment in this context. Similarly, although hygiene could have been better, the concerns of control created by the riot weigh against a finding of cruel and unusual punishment in this context. *See Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir.

1995) (Holding that "[S]ubjection of a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment."). The prisoners were not subjected to unsanitary conditions for a prolonged period in this case.

In analyzing the second application of force in *Baca*, when the prisoners refused to return to the ground on the morning of December 29th, the Court applies a factoral analysis. This kind of analysis is what the district court in *Albers v. Whitley*, 546 F.Supp. 726, 733 (D.Or. 1982), was describing in referring to "such factors as the need for application of force that was used, [and] the extent of injury inflicted." As the Supreme Court stated "[f]rom such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Whitley*, 475 U.S. at 321.

The morning of December 29th followed a night where the temperature had dropped down to 22 degrees. The prisoners were allowed to stand up and move around to warm themselves and understandably were reluctant to return to the ground when ordered to do so. Although they were repeatedly ordered to get down, a large group of the inmates remained standing. Under these circumstances, the actions of the prison officials are entitled to deference. Moreover, *Whitley* forecloses this Court from second-guessing whether the official's use of force in response to the perceived threat of renewed insurrection was the best choice among possible alternatives. The "after the fact opinion that danger was not imminent in

no way establishes that there was no danger, or that a conclusion by the officers that it was imminent would have been wholly unreasonable." *Whitley*, 475 U.S. at 323. The use of non-deadly force to restore order was not inappropriate and was clearly related to legitimate penalogical concerns. The Court rejects Plaintiffs' suggestion, made at the hearing, that the use of non-discriminate weapons, such as tear gas, worked a Constitutional violation for those on the ground. Far worse would have been the use of discriminating, and deadly, weapons on those who remained standing.

In sum, the Court will grant summary judgment to Defendants as to the claims of constitutional violations based on restraint and hygiene concerns. The Court also concludes that there was no objectively serious injury caused by the exposure to the cold, that the procedure of holding the prisoners outdoors was reasonably related to legitimate penalogical concerns, that the prison officials are entitled to deference in this area, and that therefore summary judgment should be granted on that claim. Finally, with regards to the December 29, 1995 application of force, the Court finds that the facts, taken in a light most favorable to the non-movant, clearly support a finding of exigency that requires deference to the prison officials. The Court therefore will grant summary judgment to Defendants under *Whitley*.

IT IS ORDERED that Defendants' Motion to Dismiss is **GRANTED** and this case is hereby **DISMISSED**.

DATED this 24th day of AUGUST, 1998.

/s/ Frank R. Zapata
FRANK R. ZAPATA
UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS N. JOHNSON; LEONARD TODEK, individually and on behalf of all others similarly situated; LAWRENCE E. COTTLE; JOHN PILAFAS, individually and on behalf of all others similarly situated; ROBB STEIR, individually and on behalf of all others similarly situated; RODNEY WARNER, individually and on behalf of all others similarly situated; GARY ELMORE, individually and on behalf of all others similarly situated; ELIAS GUTIERREZ;,

Plaintiffs-Appellants,

v.

SAMUEL LEWIS, former director of the ADOC in his individual capacity; TERRY STEWART, Director of the ADOC in his official and individual capacity; BILL GOTCHER, former warden of the ASP at Safford in his official and individual capacity; GLENN DAVIS, Deputy Warden of ASP Safford in his official and individual capacity; JOHN FOOTE, Deputy Warden of the ASP Safford in his official and individual capacity; JOHN ABBL, Captain DOC officer in his official and individual

No. 98-16821

DC# CV-96-00463-FRZ

(Filed Oct. 2, 2000)

individual capacity; CSO NATIONS, CSO MARCIAS, CSOII FLORES, SGT. HULL, DOC officers in their official and individual capacities; BLACKIE HASSENZELLER, Lieutenant, a member of the ADOC Tactical Support Unit in his official and individual capacity; JOHN DOE 1-10, DOC officers in their official and individual capacities; JOE HAWKINS; MATTHEW PROTO; MARK WILEY; DENNIS KILLA; JAMES BAHN; DWAYNE MORMAN; DENNIS GROGG; ROBERT STADLER; J.C. KENNEY;,

Defendants-Appellees.

LEROY PATRICK BACA; TROY HAMILTON, individually and on behalf of all others similarly situated; PAUL LARGE, individually and on behalf of all others similarly situated; ERIC BAKER; LARRY G. HARPER, individually and on behalf of all others similarly situated; VICTOR LAWRENCE FARBER, Jr.,

Plaintiffs-Appellants,

v.

TERRY STEWART, Director of the ADOC in his official and individual capacity; BILL GOTCHER, former warden of the ASP Safford in his individual and official capacity;

No. 98-16851

DC# CV-96-00464-FRZ

ORDER

FRANK TERRY, deputy warden in charge of Tonto Unit in his official and individual capacity; CSO ORTIZ, in his official and individual capacity; JOHN ABBL, Captain in his official and individual capacity; CSO THOMPSON, in his official and individual capacity; AMARILLUS, Sergeant in his official and individual capacity; JOHN DOE 1-10, CSOs in their official and individual capacity; CSO THOMPSON; MATTHEW PROTO; DENNIS GROGG; DARREN MCWHORTER, CSOII; ARMANDO AMARILLAS; DWAYNE MORMAN,

Defendants-Appellees.

Before: Circuit Judges SNEED, PREGERSON, W. FLETCHER

Judges Pregerson and W. Fletcher have voted to deny appellees' petition for rehearing and petition for rehearing en banc. Judge Sneed has voted to grant the petition for rehearing and recommends granting the petition for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER **AREA CODE 202**
CLERK OF THE COURT **479-3011**

December 26, 2000

Mr. Thomas Dennis
Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007-2926

RE: Samuel Lewis, et al.
v. Dennis Johnson, et al.
Application No. 00A561

Dear Mr. Dennis:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on December 26, 2000, extended the time to and including January 30, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Gail B. Johnson
Gail B. Johnson
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER **AREA CODE 202**
CLERK OF THE COURT **479-3011**

NOTIFICATION LIST

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No. 00-1241

Supreme Court, U.S.
FILED
MAY 4 2000
CLERK

In The

Supreme Court of the United States

SAMUEL LEWIS, former Director of the Arizona Department of Corrections, in his official and individual capacities, et al.,

Petitioners,

v.

DENNIS JOHNSON, et al.,

Respondents.

TERRY STEWART, Director of the Arizona Department of Corrections, in his official and individual capacities, et al.,

Petitioners,

v.

LEROY BACA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12pp

QUESTIONS PRESENTED

Whether these cases are properly before the Supreme Court given the procedural nature of the court of appeal's decision.

Whether *Whitley v. Albers*, 475 U.S. 312 (1986), was correctly applied to the conditions of confinement claim by the court of appeals.

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REASONS TO DENY THE PETITION

The court of appeals reversed the district court's decisions granting summary judgment to Petitioners because the district court had improperly applied the summary judgment standard. The court of appeals determined that the affidavits and depositions of the Respondents were sufficient to present genuine issues of fact in dispute, despite the videotaped evidence presented by Petitioners, which partially refutes the Respondents claims. After reversing the district court's decisions for the above reason, the court of appeals went on to address the district court's application of *Whitley v. Albers*. The discussion of *Whitley* was not necessary to the decision to reverse the grant of summary judgment. If the court of appeals' discussion of *Whitley* is ever appropriate for review by this court, it would only be appropriate after the case has gone to trial as remanded by the court of appeals. At that point, if Petitioners believe the district court's application of *Whitley* as directed by the court of appeals was incorrect, the appellate process will remain available to Petitioners at that time.

I. The decision made by court of appeals was based solely on a procedural issue

A motion for summary judgment should only be granted if the moving party can show that no genuine issue of material fact exists. Federal Rule of Civil Procedure, Rule 56 (c), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In addition, the evidence in question should be viewed in the light most favorable to the non-moving

party. *Eastman Kodak Co. v. Image Tech. Svcs.*, 504 U.S. 451, 456 (1992) and *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* at 250-1.

Eighth Amendment cases which challenge the conditions of confinement require that a Respondent make two showings. First, the Respondent must make an "objective" showing that the conditions of confinement included a deprivation which was "sufficiently serious." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Second, the Respondent must make a "subjective" showing that the prison official acted with a "sufficiently culpable state of mind." *Id.*

The district court in the these cases granted summary judgment based only on the first showing. Pet.App. at 8-9. The district court decision was based on that court's opinion that the Respondents had failed to show "either pain or denial of basic needs" and therefore "cannot show an Eighth amendment violation." Pet.App. at 31, *see also* Pet.App. at 8-9 ("The district court in these cases did not reach the question of the second required showing. . . . "). In the words of the court of appeals, the district court found that "the deprivations alleged by the plaintiff classes were not sufficiently serious to violate the Eighth Amendment." Pet.App. at 9.

The district court determined that the existence of videotapes which purported to refute the Respondents' affidavits and depositions were dispositive of the issue of whether or not an Eighth Amendment violation took place. In making this determination, the district court misapplied the summary judgment standard. In its opinion in the Johnson case, the court states that "[t]he video exhibits put many facts beyond dispute." Pet.App. at 33. This statement necessarily discounts the affidavits and depositions of the Respondents and indicates that the district court was improperly weighing the evidence. The Baca opinion states that the presence of the videotaped evidence makes the deposition testimony of Respondents "scant evidence that the actions of the prison officials resulted in the infliction of pain." Pet.App. at 42. The district court, in making this statement, was again improperly weighing the evidence and making the judgment that the videotaped evidence foreclosed any possibility that a jury could believe the testimony of the Respondents.

Respondents contend, not only that they were deprived of their basic needs, but that the few necessities which were provided were far from sufficient to meet these basic needs. For example, they contend that the sandwiches were spoiled and inedible and portable bathrooms were scarce and were soon filled with waste to the point of being unsanitary and unusable. The fact that a videotape from the Johnson case may show a few Respondents receiving food does not prove that all Respondents received food. Nor does the videotape show whether the food received was edible or, as claimed by Respondents, rotten from the Arizona sun. Similarly, a

videotape of the presence of a portable bathroom does nothing to disprove allegations that the bathroom was not available to Respondents on a sufficient basis, that it was overflowing with waste or that Respondents were forced to urinate and defecate on themselves due to the inadequacy of the bathroom facilities. The videotape in Baca may show some Respondents wearing winter clothes, but that does not disprove the allegations that some Respondents were improperly dressed, nor does it speak to the sufficiency of the purported winter clothing in terms of its weight or resistance to cold and moisture. A jacket which appears adequate visually, may not actually be adequate when lying on damp ground for an entire night.

The court of appeals agreed with Respondents that the factual issues regarding the adequacy of food, water, shelter and bathroom facilities were not disposed of by the presence of the videotape. As the court of appeals stated, "[t]his videotape evidence is important and may eventually be dispositive in favor of the state. At this stage of the litigation, however, it does not overcome the plaintiffs' evidence." Pet.App. at 11. The court of appeals concluded that there existed "disputed questions of material fact that cannot be resolved at summary judgment" and that a factfinder could "conclude that the plaintiffs suffered a sufficiently serious deprivation to violate the Eighth Amendment." Pet.App. at 12.

Because the district court made its decisions based upon its belief that the harm suffered was not sufficiently serious, the court of appeals effectively reversed those decisions when it determined that evidence existed from which a jury could determine that sufficiently serious

deprivation did, in fact, take place. No further discussion or action was necessary from the court of appeals. Nonetheless, the court of appeals addressed the district court's application of *Whitley*, even though *Whitley* does not apply to the objective, but only the subjective portion of an Eighth Amendment claim. The district court did not reach the subjective part of the Eighth Amendment analysis. The basis for the court of appeals' decision was purely procedural and, as such, does not present the sort of question which merits the consideration of this Court.

II. The court of appeals correctly applied *Whitley*

Even though the district court did not reach the subjective part of the Eighth Amendment analysis, the court of appeals discussed *Whitley* and its application to the facts at hand. *Whitley* held that during a riot situation, a heightened standard of deference applies to the prison officials' actions. The reasoning behind the *Whitley* standard is that the deliberate indifference standard set out by *Estelle v. Gamble*, 429 U.S. 97 (1976), does not consider the forces at play when a decision is "made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. 310, 320 (1986).

Whitley does not apply to conditions of confinement cases; it only applies "when an inmate seeks to hold an individual prison officer liable for using excessive force against the Respondent during a particular incident." *Madrid v. Gomez*, 889 F.Supp. 1146, 1247 (N.D.Cal. 1995). This is not the situation in the *Baca* and *Johnson* cases. The Respondents seek to hold prison officials and administrators responsible for the inhumane conditions they were

forced to endure following the riot. Clearly the *Whitley* standard does not apply in this case as there is no "particular" incident of excessive force which is being alleged. Respondents allege that the overall conditions, including lack of food, water, sanitary facilities and shelter were inhumane and in violation of the Eighth Amendment. The Respondents allege deprivations which set out a conditions of confinement claim to which the lower standard of deference set out in *Estelle* applies. *See Madrid*, 889 F.Supp. at 1246 ("This 'baseline' standard applies in cases alleging . . . inhumane conditions of confinement that deprive an inmate of a basic necessity of life, such as shelter, food, health or exercise.")

Even if this was considered an excessive force case, *Whitley*, itself, contemplates the idea that, after a riot has ended and the inmates are under control, the heightened standard of deference to prison officials is no longer applicable. In *Whitley*, the Court stated that "although the evidence could be taken to show that the general disturbance had quieted down," a hostage situation still existed and armed inmates were still at large. *Whitley*, 475 U.S. 322-3. The Court believed that "[t]he situation remained dangerous and volatile." *Id.*

By addressing whether the riot had actually ended, the *Whitley* court recognized that there is a finite time to which the heightened standard of deference applies. Other courts have also recognized that when exigent circumstances cease to exist, the *Whitley* standard ends as well. *See, e.g., Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987) (when there is "no imminent danger" in a prison disciplinary action, *Whitley* does not apply). The courts of

appeals also agree that *Whitley* does not apply after the need for making split second decisions passes.

Petitioners believe that the courts of appeals differ in their application of *Whitley*, citing several cases beginning on page 16 of their Petition. Petitioners' interpretation of these cases is incorrect. These courts may reach different decisions as to whether the *Whitley* standard applies to their cases, however, these differences are not due to disagreement as to how to apply *Whitley*. These differences arise because the courts of appeals are correctly applying *Whitley* to their particular factual situations and reaching appropriate decisions about whether their facts present exigent circumstances justifying the heightened standard. Because some of the courts determine that their facts warrant the *Whitley* standard while others decide the original standard set out in *Estelle* is appropriate does not mean that they are misapplying *Whitley*.

In fact, these cases simply demonstrate that the courts of appeals recognize the basic legal principal "that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation." *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991); *see also Sims v. Mashburn*, 23 F.3d 980, 984 (11th Cir. 1994) ("The general principle, explained the court, is that the application of force after it is no longer penologically justified can violate the Eighth Amendment.")

CONCLUSION

Because there is no confusion among the courts of appeals as to when and how to apply the *Whitley* standard, and because the district court in these cases did not even reach the subjective question to which *Whitley* properly applies, these cases are not appropriate for review by the Court. In addition, the court of appeal's decision was based solely on the basis of the correct application of the standard for summary judgment. This is a standard which is well-established and does not require any further review by this court. For these reasons, the writ of certiorari should be denied.

Respectfully submitted,

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No. 00-1241

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In The

Supreme Court of the United States

SAMUEL LEWIS, former Director of the Arizona Department of Corrections, in his official and individual capacities; et al.,

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v.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. THE COURT OF APPEALS DID NOT BASE ITS DECISION "SOLELY ON PROCEDURAL GROUNDS," BUT SQUARELY DECIDED WHAT STANDARD MUST BE APPLIED TO THE SUBJECTIVE PRONG OF THE EIGHTH AMENDMENT CLAIM IN THIS CASE.

This Court should reject Respondents' attempt to avoid this Court's review by suggesting that the majority opinion below was based solely on a procedural ground concerning the weight to the given videotape evidence on summary judgment. This argument ignores that, before reaching such factual matters, the courts below were first required to identify the legal standard against which the facts would be applied. Petitioners are not seeking review for the reason that the Ninth Circuit incorrectly applied the facts by failing to give adequate credence to a videotape.

Rather, review is sought because, on the subjective prong of Respondents' Eighth Amendment claim, the Ninth Circuit squarely and erroneously decided to apply the legal standard created by this Court to adjudicate normal prison conditions in *Estelle v. Gamble*, 429 U.S. 97 (1976). Instead, the Ninth Circuit should have applied nothing less than the full measure of deference this Court held prison officials are entitled to in *Whitley v. Albers*, 475 U.S. 312 (1986), when they are forced to maintain security in the aftermath of an extraordinary prison disturbance. Had the court of appeals applied the correct law, it would have affirmed the trial court's determination that the Petitioner prison officials were entitled to summary judgment.

This Court should also reject Respondents' unstated implication that the Ninth Circuit's decision on the subjective standard was unnecessary dicta and therefore beyond this Court's review at this time. The Ninth Circuit had before it an appeal from a grant of summary judgment on an Eighth Amendment claim that consisted of two elements – objective and subjective. It is now well established that on appeal from a summary judgment, an appellate court may reach any possible ground to affirm, even though the district court did not address the question. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.2d 1141, 1154 (9th Cir. 2000) (a case may be affirmed on any ground supported by the record. "Where precisely the same result could have been reached on other grounds apparent from the record, sending the case back to the district court is wasteful both for the courts and for the litigants. *See also SEC v. Chenery*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943)."). *See also* 10A Charles Alan Wright, et al., *Federal Practice and Procedure Civil* § 2716, at 290 (3d ed. 1998).

Here, the district court clearly determined that, in adjudicating the post-riot actions of the Petitioner prison officials, the heightened *Whitley* test governed the subjective element. Appendix to Petition for Writ of Certiorari (App.) at 27-28, 38-40. The district court spent considerable time explaining its reasoning, but ultimately concluded it did not need to apply the *Whitley* standard because Respondents' allegations were not objectively serious enough to state an Eighth Amendment claim. Nevertheless, the district court made clear its belief that a *Whitley*-type standard controlled.

In reversing the district court's grant of summary judgment, the court of appeals determined that the Respondents had adduced sufficient evidence on both the subjective and objective elements of their Eighth Amendment claim. The analysis by the court of appeals concerning application of the *Whitley* standard to the subjective element was not mere dicta, but instead was essential to its holding that the district court erred in granting summary judgment. Had the court of appeals agreed with the district court that the *Whitley* standard applied, it would have affirmed the district court's decision on that alternate basis.

The court of appeals' resolution of this issue, therefore, was not merely careless surplusage unworthy of this Court's consideration. *See Patel v. Sun Co., Inc.*, 141 F.3d 447, 462 (3rd Cir. 1998) (defining dictum as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding – that, being peripheral, may not have received the full and careful attention of the court that uttered it.") (quoting *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986)). Thus, pursuant to established principle, the court of appeals necessarily addressed a potentially dispositive issue that had been fully determined by the district court and argued by the parties on appeal.

Indeed, the inmates' Opening Brief in the Ninth Circuit made a point of separately challenging the district court's decision concerning the subjective component of the Eighth Amendment claim. One of Respondents' arguments was that prison officials' actions "fell outside the wide-ranging grant of deference that should normally be

afforded to prison officials when reviewing action purportedly taken to preserve internal order and discipline." *Baca v. Stewart*, 9th Cir. No. 98-16851, Respondents' Opening Brief at 23. Respondents argued alternatively that they satisfied the evidentiary standard articulated by *Whitley*, or that the district court misinterpreted and misapplied *Whitley*. Respondents' Opening Brief at 24-27. Conversely, in their Answering Brief, Petitioners argued specifically and at length that *Whitley* controlled the decision in this case. *Baca v. Stewart*, 9th Cir. No. 98-16851, Petitioners' Answering Brief at 13-20. It should come as no surprise, therefore, that the Ninth Circuit Court of Appeals addressed an issue that was both squarely dealt with by the district court below and fully argued by the parties on appeal. To have done otherwise would have been both wasteful and contrary to appellate practice in summary judgment cases.

There can be no legitimate argument on this point – application of *Whitley* to the post-riot facts presented by these cases was both argued by the parties and squarely decided by the Ninth Circuit. Thus, Respondents cannot escape the fact that the Ninth Circuit panel chose to decide the question of the correct subjective standard and its ruling – that the Petitioner prison officials were not entitled to deference during the period when they were trying to identify and segregate riot participants to prevent an almost certain reignition in hostilities – is now the law of the case which the district court will be required to follow on remand. As in the Ninth Circuit, it would be wasteful for this matter to be remanded to the district court for a full trial using an incorrect legal standard.

II. THE COURT OF APPEALS INCORRECTLY APPLIED *WHITLEY*.

Respondents barely address the merits. They ignore that the Ninth Circuit's decision conflicts with this Court's admonition in *Whitley* that deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to "prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline." 475 U.S at 322. Respondents ignore that the Ninth Circuit's decision conflicts with this Court's admonition in *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), that the *Whitley* standard applies to both riots and "lesser" disruptions where corrections officers must balance the need to maintain or restore discipline against the risk of injury to others. Respondents ignore the conflict between the Ninth Circuit's decision here, its own prior decision, and decisions from other courts throughout the country. Finally, as Circuit Judge Sneed stated in his dissenting opinion below:

> The majority simply ignores the constraints the prison officials were faced with and presumes that conditions should have been normal the moment the officials "were able successfully to remove the prisoners from the buildings and secure them in the prison yard." Maj. Op. 734. This approach is unrealistic because it improperly holds the prison officials to a standard of conduct that will be difficult for them to meet.

App. at 22.

Application of *Whitley* is required in this case to give prison officials the level of deference required by the emergency situations they faced. This Court should grant certiorari and reverse the court of appeals' decision supplanting its judgment for that of Arizona's prison officials.

Respectfully submitted,

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